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WHEN A WILL INTENDS AN EQUITABLE CONVERSION

The intention of a testator is a conundrum of such peculiar fascination that the power of creating an ambiguous future interest may be his sole guaranty of earthly immortality; particularly if his estate is subject to one of those eternal controversies between the life tenant and the remainderman. In 1921 we find out from the New York Court of Appeals in *Furniss v. Cruikshank* (Mar. 8) what a testator who died in 1871 meant by his will.[1] William P. Furniss created a trust of unproductive real estate, the income payable to a life beneficiary, with the remainder to others. The will expressed no imperative order of sale and declared that " all powers herein given are intended to be dis- "cretionary, and to be exercised or not as the executors and trustees "should think proper." The trust fund for the life tenant was set up in 1874, and the unproductive real estate was sold in separate lots between 1885 and 1902. The plaintiffs, claiming under the now deceased life tenant, sued the trustees for income computed as if the land had been sold in 1875. Reversing the decisions of the Special Term and the Appellate Division, the New York Court of Appeals decided that Furniss intended the proceeds, when realized, to be apportioned between income, payable from the time of his death to the life beneficiary, and principal belonging to the remainderman. By taking all of the circumstances into account, an equitable conversion was found to have been intended, and the discretion conferred upon the trustees applied only to the time of a sale, which itself was imperative.

The case is an interesting example of the tendency to favor the immediate beneficiary. The crux of the question is whether an imperative order of sale was intended, for without it, no equitable conversion is possible.[2] To find a command to sell from surrounding circumstances in the face of an expressed discretionary power places New York in a unique position on the question.[3] No court has gone as

[1] Not yet reported. For the opinions below see (1920) 191 App. Div. 450, 181 N. Y. Supp. 522; (1915, Sup. Ct.) 90 Misc. 138, 154 N. Y. Supp. 272.

[2] See cases collected in 20 L. R. A. (N. S.) 65, note; 6 R. C. L. 1075; *Yates v. Yates* (1860, Ch.) 28 Beav. 637; *In re Cooper's Estate* (1903) 206 Pa. 628, 56 Atl. 67. Where the general scheme of a will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion. *Ford v. Ford* (1887) 70 Wis. 19, 33 N. W. 188; see 7 Eng. Rul. Cas. 24, 25.

[3] The instant case relies upon *Spencer v. Spencer* (1916) 219 N. Y. 459, 114 N. E. 849, where a trust fund was created with full power to the trustees to sell "in their discretion, and at such prices . . . as they may deem proper." The immediate precedent for *Spencer v. Spencer* was *Lawrence v. Littlefield* (1915) 215 N. Y. 561, 109 N. E. 611, where there was an "imperative power of sale and an equitable conversion of the real estate into personalty at the death of the testator." The actual will is not given. *Edwards v. Edwards* (1903) 183 Mass. 581, 67 N. E. 658, is the most nearly analogous decision in any other jurisdiction, but the will contained no general discretionary clause and the court said: "It was the duty of the trustees to convert this property into an income-producing fund." *Spencer v. Spencer, supra,* apparently marks the point at which New York

far in liberality of interpretation. But once an imperative order of sale is found, the principle of the decision is clear. Where a testator gives property to trustees with an absolute trust for conversion and a discretion as to the time at which the conversion shall take place, a delay at the instance of the trustees should not prejudice the rights of the life tenant; he should have the same benefit as if the conversion had occurred within a reasonable time after the death of the testator,[4] a period usually fixed at twelve months.[5] Why should the life tenant, the child of the testator, the immediate object of his bounty, fast during lean years so that remaindermen may feast in the remote future? The result is one which every court would desire to reach, but which it is believed few would have reached in the instant case.

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How far does that vague phrase "superintending control," so often used in our state constitutions to confer extraordinary powers on the appellate court, justify interference with the action of the inferior courts? It has been variously construed to allow the appellate court to compel a change of venue,[1] to order an inferior court to go on with a criminal proceeding when it has wrongfully quashed a complaint,[2] and to issue a mandamus ordering the lower tribunal to grant a creditor an opportunity to examine an assignee.[3] The power is broad and indefinite, but the most liberal courts refuse to exercise it where other relief is provided and no emergency requiring immediate action exists.[4] The North Dakota court in the case of *Lowe v. District Court* (1921, N. D.) 181 N. W. 92, has gone further than would seem to be justified by its own previous decisions or by the construction put upon the phrase by the most liberal courts.[5] The applicant for the exercise of this power

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departed from a previously settled rule. See *Yates v. Yates, supra* note 2, for instance, where the testator left unimproved real estate to trustees with "absolute discretion" of sale. Cardozo and Hogan, JJ., dissented in the instant case; they concurred in the Spencer case.

[4] *Sitwell v. Bernard* (1801, Ch.) 6 Ves. 520, is the leading case. *Gibson v. Bott* (1802, Ch.) 7 Ves. 89; *Kilvington v. Gray* (1825, Ch.) 2 Sim. & Stu. 396; *Walker v. Shore* (1815, Ch.) 19 Ves. 387; *Taylor v. Clark* (1841, Ch.) 1 Hare, 161; *Wilkinson v. Duncan* (1857, Ch.) 23 Beav. 469; 6 R. C. L. 1079.

[5] *Kilvington v. Gray, supra* note 4; *Taylor v. Clark, supra* note 4; *Sitwell v. Bernard, supra* note 4; *Tucker v. Boswell* (1843, Ch.) 5 Beav. 607; *Sargent v. Sargent* (1869) 103 Mass. 297.

[1] For a general discussion of the recent cases involving the exercise of this power see 20 L. R. A. (N. S.) 942, note.

[2] *State, ex rel. Umbreit, v. Helms* (1908) 136 Wis. 432, 118 N. W. 158.

[3] *State, ex rel. Fourth Nat'l Bank, v. Johnson* (1899) 103 Wis. 591, 79 N. W. 1081.

[4] *State, ex rel. Red River Brick Corp., v. District Court* (1912) 24 N. D. 28, 138 N. W. 988.

[5] *State, ex. rel. Att'y Gen., v. District Court* (1904) 13 N. D. 211, 100 N. W. 248; *Long v. Kaufman Co.* (1910) 127 La. 333, 53 So. 583; see also *State, ex rel. Bank, v. Johnson, supra* note 3; *State, ex rel. Red River Brick Corp., v. District*

was charged with statutory rape, and by some peculiar trick of fate and politics, was brought up for trial before a judge whom he had just defeated for re-election after a bitter contest. An affidavit of prejudice having been filed, the judge ordered a transfer to Ramsey County without designating a presiding judge, as required by statute. Ramsey County, a stronghold of the anti-Nonpartisan Leaguers, was equally unsatisfactory to the accused, a Nonpartisan. He applied to the Supreme Court for the issuance of a writ to compel the transfer to McHenry or Renville Counties. The court, without remanding the case to the lower court to correct the irregularity in its proceedings, designated a county and judge "to effect a speedy trial." The two dissenting judges refused to recognize that the exigency of the case demanded the exercise of this unusual power. The split in the court on political lines would seem to indicate that the peculiar political situation in North Dakota was an important factor in the decision.

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In *Tremblay v. Despatie* (1921, P. C.) 37 T. L. R. 395, the issue was finally settled as to whether the courts of the Province of Quebec could recognize religious impediments to marriage as grounds for annulment. It was admitted that had the fact as to the relationship of the parties been known to the officiating priest at the time, he could have required a dispensation before performing the ceremony. The Privy Council reversed the Supreme Court of Canada and held that the marriage was valid. Although there is practically no authority directly on the point, the decision is in accord with what has been elsewhere accepted as the rule, that the law will not recognize a disability of a religious character.[1] It has been held that a Hindu domiciled in India could not set up a personal disqualification for marriage outside his caste and religion in order to impeach the validity of a marriage with an English woman in England solemnized according to English law.[2] The decision puts an end to any possible claims which religious authorities of any denomination may have had that the courts should give religious disabilities operative effect at law.

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*Court, supra* note 4. And see also *State, ex rel. Anaconda Copper Co., v. District Court* (1901) 25 Mont. 504, 65 Pac. 1020 where, by "a writ of supervisory control," the lower court was required to reverse an order that it had made allowing the inspection and survey of all underground workings of the petitioner's mines by an adverse litigant. The order so made by the lower court was within its jurisdiction.

[1] 16 Halsbury, *Laws of England* 283 (1911) sec. 524.

[2] *Chetti v. Chetti* [1909] P. 67.